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THE CENTRALISATION OF JUDICIAL POWER WITHIN THE AUSTRALIAN FEDERAL SYSTEM

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ABSTRACT

This article considers the patterns of centralisation within the federal judicial system. While centralisation of legislative, executive and fiscal power within the federal system has been well documented, the architecture of judicial federalism has been the subject of less attention. The article, first, seeks to show that principles derived from Chapter III of the Constitution have, on the whole, exhibited broadly similar centralising characteristics and exerted centralising effects, and, secondly, offers explanations for this centralisation.

I INTRODUCTION

The centralisation of power within the Australian federal system has been well documented. The expansion of federal legislative power is well known. The High Court has developed characterisation principles¹ and other rules of interpretation² that allow expansive readings of federal heads of legislative power.³ The federal

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¹ *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1; *New South Wales v Commonwealth* (2006) 229 CLR 1 ('Work Choices').

² *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('Engineers Case').

³ See generally Leslie Zines, 'Changing Attitudes to Federalism and its Purpose' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 86; James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia has Undermined Australian Federalism' (2008) 30 *Sydney Law Review* 245; Nicholas Aroney, 'Constitutional Choices in the Work Choices Case, or What Exactly is Wrong with the Reserved Powers Doctrine' (2008) 32 *Melbourne University Law Review* 1; Senate Select Committee on the Reform of the Australian Federation, Parliament of Australia, *Australia's Federation: An Agenda for Reform* (2011).

Parliament can reach into areas traditionally regulated by the States, and achieve purposes and pursue policies that are not obviously federal in nature. Examples frequently given include the regulation of the environment,⁴ industrial relations⁵ and human rights.⁶ The federal Parliament can use taxation as a regulatory tool, not just as a means to fill the public purse.⁷ Furthermore, the Commonwealth can, pursuant to s 96 of the Constitution, grant money to the States under wide reaching and controlling conditions that require States to achieve federal policy agendas and, indeed, reduce States to instruments for the achievement of federal policy priorities.⁸ The control of education and the health system are common examples identified when commentators express concern about the federal imbalance.⁹

The High Court's broad interpretations of the Commonwealth's revenue raising power,¹⁰ the facilitation of a federal income tax monopoly,¹¹ and the narrowing (under s 90) of state power to impose taxes on goods,¹² have all contributed to a vertical imbalance in federal fiscal relations, and provides the potential for federal policy domination through the use of tied grants under s 96.¹³ Additionally, the expansive reach of federal executive power has provided a further foothold for the growth in federal power,¹⁴ although in more recent decisions the Court has reconsidered this expansive trend — at least so as to give the federal Parliament control over the federal executive.¹⁵

However, these efforts to map the dynamics of the federal system largely have been directed to *legislative, executive and fiscal federalism*. '*Judicial federalism*',¹⁶ on the other

⁴ *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'); *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1.

⁵ *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169; *Work Choices* (2006) 229 CLR 1.

⁶ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

⁷ *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1; *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555; *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2011) 244 CLR 97.

⁸ See Anne Twomey, 'Pushing the Boundaries of Executive Power — Pape, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313.

⁹ See the collection of essays in Paul Kildea, Andrew Lynch and George Williams, *Tomorrow's Federation: Reforming Australian Government* (Federation Press, 2012).

¹⁰ *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555.

¹¹ *South Australia v Commonwealth* (1942) 65 CLR 373 ('*First Uniform Tax Case*'); *Victoria v Commonwealth* (1957) 99 CLR 575 ('*Second Uniform Tax Case*').

¹² *Ha v New South Wales* (2007) 189 CLR 465.

¹³ Anne Twomey, 'The Future of Australian Federalism — Following the Money' (2009) 24 *Australasian Parliamentary Review* 11; Alan Fenna, 'Commonwealth Fiscal Powers and Australian Federalism' (2008) 31 *University of New South Wales Law Journal* 509.

¹⁴ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; Cheryl Saunders, 'The Sources and Scope of Commonwealth Power to Spend — Case Note; *Pape v Federal Commissioner of Taxation*' (2009) 20 *Public Law Review* 256; Twomey, above n 13; Andrew McLeod, 'The Executive and Financial Powers of the Commonwealth: *Pape v Commissioner of Taxation*' (2010) 32 *Sydney Law Review* 123.

¹⁵ *Williams v Commonwealth* (2012) 248 CLR 156; *Williams v Commonwealth* (2014) 88 ALJR 701.

¹⁶ An expression that I have adopted from Gavan Griffith and Geoffrey Kennett, 'Judicial Federalism' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 37.

hand, has not been the subject of sustained consideration. There is excellent work that has demonstrated the increased significance of Ch III and Commonwealth judicial power.¹⁷ However, contributions on the *federal* dynamics of Ch III are relatively rare.¹⁸ Stephen McLeish SC has provided a valuable entry into this field by exploring the increased ‘convergence of constitutional principles applicable to State and federal politics ... and a convergence of common law and constitutional principles’.¹⁹ Other recent contributions have started to populate this field. In an insightful article, Brendan Lim has sought to reclaim the *Kable* principle as a ‘doctrine of federalism’,²⁰ and Gabrielle Appleby has argued that the harmonising effect of *Kable* ‘has the potential to undermine the States’ capacity for experimentation and diversity in the law and order sphere’.²¹

This article seeks to extend the territory further, first, by showing that Ch III principles have, on the whole, exhibited centralising characteristics and exerted centralising effects, and, secondly, by offering explanations for this centralisation.

II THE MARKERS OF CENTRALISATION

Expressed in broad and unrefined terms, the central argument of this article is that there has been increased centralisation of judicial power within Australia. This argument, however, is packed with imprecision and, as a first step, it is important to refine the parameters of the project. Specifically, it is important to identify, first, the markers of a federal system and, secondly, the competing conceptions of the *federal* and the *national* that underlie Australian federalism. This section will identify these federal dimensions, providing a framework and a language to commence mapping the federal judicial system.

As Nicholas Aroney has explained in illuminating detail, ‘conceptualising federalism is contentious and difficult’.²² ‘The basic idea’, Aroney writes, ‘is that of a political system in which governmental power is divided between two territorially defined levels of government, guaranteed by a written constitution and arbitrated by

¹⁷ See, for example, the collection of essays in Brian R Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000); Fiona Wheeler, ‘The Rise and Rise of Judicial Power under Chapter III of the Constitution: A Decade in Overview’ (2001) 20 *Australian Bar Review* 283.

¹⁸ Recent collections on Australian federalism consider the judicial system sparingly: see, Kildea, Lynch and Williams, above n 9; Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012). During the inquiry by the Senate Select Committee on the Reform of the Australian Federation, the Attorney-General for Western Australia highlighted the centralisation of judicial power, but the matter was not explored by the Committee nor made the subject of a specific recommendation: see Senate Select Committee on the Reform of the Australian Federation, above n 3, 14 [1.49].

¹⁹ Stephen McLeish SC, ‘The Nationalisation of the State Court System’ (2013) 24 *Public Law Review* 252–257.

²⁰ Brendan Lim, ‘Attributes and Attribution of State Courts — Federalism and the *Kable* Principle’ (2012) 40 *Federal Law Review* 31, 32.

²¹ Gabrielle Appleby, ‘State Law and Order Regimes and the High Court: A Study in Federalism and Rights Protection’ (2014) *Monash University Law Review* (forthcoming).

²² Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 17.

an institution independent of the two spheres of government, usually a court of final jurisdiction'.²³ While this focus on a *division* of power between two levels of government provides a marker of a federal system, for Aroney, it is an insufficient basis for studying and mapping federal systems of government. Drawing from the analysis of James Madison in *Federalist No 39*, Aroney adds additional federal markers. Most importantly for this article are 'the ... institutions adopted under the federation' (that is, the structure of the legislature, executive and the judiciary).²⁴ Importantly, each of these federal markers reflect accommodations of *federal* (or, more precisely, and to avoid confusion, '*confederal*'²⁵) and *national* features. As explained by Madison in the American context, the *confederal* features of these markers were characterised by a *distinctiveness* of the constituent *states* within the federal system, whereas the *national* features were characterised by an emphasis on the *aggregate nation* that comprised the federal system.²⁶

Studies of Australian legislative and executive federalism have tended to focus on the expansion of federal power into areas traditionally regulated by the States and the benefits and costs associated with the uniformity which results from such centripetal tendencies. Given the federal dimensions that characterise the legislative and executive arms of government, questions of *division* of power (or, perhaps more accurately in the Australian context, the *distribution* of power) and *uniformity* of outcomes flowing from an expansion of federal power are a natural starting point. Aroney's analysis of Australian federalism takes the focus beyond questions of *distribution*, to consider the federal features of the *structures* of the federal legislature.²⁷ His work compellingly demonstrates the extent to which *confederal* and *national* elements were reflected in each of these constitutional dimensions.

This article picks up this scent and traces it through to judicial federalism. Part III further explores the *institution* of government not considered by Aroney in detail — that is, the judiciary — and will track the extent to which it is characterised by *confederal* and *national* features. Part IV will explore the principles developed by the High Court that exhibit a tendency to amplify the *national* features of the federal judicial system, and which have resulted in a marginalisation of the *confederal* features that recognised the distinctiveness of state judicial systems. In short, the article will demonstrate that the High Court has interpreted provisions of Ch III, and developed principles and implications arising from its text and structure, in a way that has led to increased centralisation of judicial power within the federal judicial system. Part V will then offer explanations, detected in the cases, for this centralising trend.

Before turning to develop that position, it is necessary briefly to sketch out the federal architecture of Ch III.

²³ Ibid.

²⁴ Ibid 21–2. Other markers identified by Aroney are the 'formative basis of the Constitution' (that is, 'the process by which the Constitution was drafted') and the amendment process. This project has nothing to add in that respect. As Aroney explains, these federal markers were highlighted by James Madison in *Federalist No 39* when defending the proposed US Constitution (at 21–2).

²⁵ Ibid 22.

²⁶ Ibid 22–4.

²⁷ And the *formative* basis for the Australian federal system and the *amendment process*, neither of which is particularly relevant to the judiciary.

III THE FEDERAL ARCHITECTURE OF CHAPTER III – DISENTANGLING THE NATIONAL AND THE CONFEDERAL

It is clear that federalism is a central organising principle in Ch III, and that federal (both *national* and *confederal*) features can be seen operating at various levels. Four core features of that federal architecture will be introduced in this Part.

A Federal vs state judicial power

First, and most obviously, as is the case in relation to the legislative power under Ch I and the executive power under Ch II, Ch III of the Constitution assumes two distinct sources of power and jurisdiction – federal and state. As French CJ and Gummow J said in *Lane v Morrison*,²⁸ '[t]he judicial power identified in Ch III is that of a body politic, namely the Commonwealth, which is distinct from that of the States ...'. The contrasting concepts of state and federal jurisdiction were explained by Gleeson CJ, Gaudron and Gummow JJ in the following way in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*:²⁹ state jurisdiction is 'the authority which State Courts possess to adjudicate under the State Constitution and laws' and federal jurisdiction is 'the authority to adjudicate derived from the Commonwealth Constitution and laws'.

This federal feature was designed to mirror the federal character of the judicial provisions in the United States Constitution. Consistently with that model, and with the conferral of legislative power on the federal Parliament, federal judicial power was to be limited to certain enumerated heads of jurisdiction that were appropriate to the federal level of government. The nine heads of federal jurisdiction, as set out in ss 75 and 76 of the Constitution, had appeared in the drafts presented to the 1891 Convention by Andrew Inglis Clark and Charles Kingston³⁰ and largely remained unchanged throughout the debates.³¹

Thus, the first important federal feature in Ch III can be identified as the existence of two sources of judicial power and jurisdiction: Commonwealth and state. A separate state judicial power and jurisdiction recognises the distinctiveness of the States within the federal system.

B Federal and state courts

Secondly, Ch III provides the source of power for the creation of federal courts. The High Court, itself, is created by the Constitution and, although there is no explicit power for Parliament to create lower federal courts, such a power is necessarily implied. 'State courts', on the other hand, 'are an essential branch of the government of

²⁸ (2009) 239 CLR 230, 237. See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 574 (Gummow and Hayne JJ).

²⁹ (2001) 204 CLR 559, 570.

³⁰ See John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 88, 127.

³¹ That the content of federal jurisdiction reflected the subjects assigned to the federal judiciary in art III of the United States Constitution was made clear by Inglis Clark when he explained his draft clauses in the following way: 'The matters I have placed under the jurisdiction of the Federal Judiciary are the same as those placed by the Constitution of the United States under the jurisdiction of the Supreme Court of the American union' (ibid 69).

a State',³² and the provisions of Ch III contemplate that state courts continue as creatures of state governments. As Isaacs J said in *R v Murray and Cormie*,³³ '[t]he Constitution, by Chapter III, draws the clearest distinction between federal Courts and State Courts'. Citing his Honour's comments, Knox CJ, Rich and Dixon JJ in *Le Mesurier v Connor*³⁴ added that 'the Courts of a State are the judicial organs of another Government'.

C Federal structure of the federal judiciary — state courts to be 'federalised'

Thirdly, the structure of the institution through which Commonwealth judicial power is exercised (that is, the federal judicature) is also federal in character. Unlike the other two federal arms of government, the federal judicial structure is complicated by the provision for the exercise of federal judicial power and jurisdiction by state courts — the so-called 'autochthonous expedient'.³⁵ Until the Adelaide session of the 1897–8 Constitutional Convention, the institutional design of the federal judicature matched the United States model in art III of the US Constitution: only federal courts were to exercise federal judicial power.

However, the establishment of a complete set of lower federal courts would be an expensive proposition and, at least for Western Australia, the extra expense was creating apprehension.³⁶ The 'federalisation'³⁷ of state courts provided the answer, and the investiture of state courts with federal jurisdiction to exercise Commonwealth judicial power was accepted from that point forward. Thus, the second federal feature of Ch III can be seen in its structural design of the federal judicature. While the US model of federalism dictated a complete separation of federal and state courts, recognition of the practical difficulties of such a model in Australian conditions resulted in a unique federal model of institutional integration for the exercise of federal judicial power. The distinctiveness of state courts as repositories of state judicial power and jurisdiction was qualified by the desire for a national solution for the exercise of Commonwealth judicial power.

D High Court as a general court of appeal

While the first and second of these features emphasise the separateness or distinctiveness of the States, the third feature reflects, to a large extent, a national judicial structure for the exercise of federal jurisdiction: at least where the Parliament chooses to take up the option, state courts can exercise federal judicial power alongside (or instead of) lower federal courts.

The fourth federal feature is also a national one, and marks a second point of departure from the US model of federalism. Whereas the US Supreme Court only exercises appellate jurisdiction from state courts in relation to federal matters, under s

³² *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 575 (Brennan and Toohey JJ); see also at 547 (Mason CJ, Wilson and Dawson JJ).

³³ (1916) 22 CLR 437, 452.

³⁴ (1929) 42 CLR 481, 495.

³⁵ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268.

³⁶ See John A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1974) 130–1; Kenneth H Bailey, 'The Federal Jurisdiction of State Courts' (1939–41) 2 *Res Judicatae* 109.

³⁷ Alfred Deakin suggested that state courts be 'federalised' during the *Official Debates of the Australasian Federation Conference*, Melbourne, 10 February 1890, 26.

73 of the Constitution, the High Court operates as a general court of appeal from state Supreme Courts irrespective of whether the issue is federal or non-federal.

The establishment of a general court of appeal had long been on the agenda before the Constitutional Conventions of the 1890s.³⁸ Furthermore, as Quick and Garran noted, the drafters were 'accustomed to a common court of appeal in the shape of the Privy Council', and 'the advantages of having one uniform Australian tribunal of final resort outweigh[ed] all feelings of localism'.³⁹ That the High Court was to have this general appellate jurisdiction was not in question, and the main debates surrounding s 73 concerned proposals to sever Australian appeals to the Privy Council.⁴⁰ The existence of that general appellate jurisdiction is an important national feature of federalism that finds its place in Ch III.

E Summary

Federalism is a defining feature of Ch III at multiple levels: in the separate identification of federal judicial power in relation to enumerated heads of federal jurisdiction and in contrast to the continuation of state judicial power and jurisdiction; in the recognition that federal and state courts are distinctive creatures of their respective bodies politic; in the structural integration of the federal judicature to include state courts when required by the federal Parliament to exercise federal jurisdiction; and in the integration of the judicial system through a general appellate jurisdiction.

IV PATTERNS OF CENTRALISATION

While Ch III was designed in a way to accommodate the competing federal conceptions of the *confederal* and the *national* (that is, separateness/distinctiveness vs aggregation/integration), the High Court has largely developed Ch III principles that erode the distinctive features of state judicial systems. As will be seen, we have a federal judicial system that is characterised by an expansion of federal judicial power, a convergence of institutional design and uniformity of outcome across judicial systems.

A The allocation of power: the expanded reach of federal judicial power

As mentioned, one of the defining features of the Australian federal judicial system is that there are two sources of judicial power and jurisdiction: federal and state. Despite the creation of Commonwealth judicial power, federal jurisdiction and a judicial system through which that power and jurisdiction are exercised, state jurisdiction and judicial power to be exercised by state courts retained a distinctive existence from the federal judicial system created by Ch III. This section will show that there has been an expansion of the jurisdictional opportunities for the exercise of Commonwealth judicial power, by both federal and state courts, at the expense of state jurisdiction and judicial power. The core platform for this centralisation of judicial power has been the development of the concept of *accrued jurisdiction*.

³⁸ See John M Bennett, *Keystone of the Federal Arch* (Australian Government Publishing Service, 1980) 3–6.

³⁹ John Quick and Robert Garran, *The Annotated Constitution of the Australian Constitution* (1901) 725.

⁴⁰ See James Stellios, *The Federal Judicature — Chapter III of the Constitution: Commentary and Cases* (LexisNexis Butterworths, 2010) 9–33.

1. *Accrued jurisdiction*

Federal jurisdiction is created and identified in ss 75 and 76 of the Constitution by reference to the word 'matter'. Parliament's power to vest additional federal jurisdiction in the High Court (s 76) and federal jurisdiction in lower federal courts (s 77(i)) and state courts (s 77(iii)) is conditioned by the existence of a 'matter'. In a series of cases in the early 1980s,⁴¹ the High Court laid the foundations for an increased centralisation of judicial power by developing an expansive principle of 'accrued jurisdiction'. The pivotal concept of 'matter' was read by the Court to refer to the underlying 'justiciable controversy, identifiable independently of the proceedings which are brought for its determination and encompassing all claims made within the scope of the controversy',⁴² whether federal or state-based. Furthermore, the Court took a relaxed approach for determining whether federal and state claims form part of the same 'matter': if they are non-severable, in the sense that they arise from the same substratum of facts, then a court will hear the state claim in 'accrued' federal jurisdiction.⁴³

Thus, in short, where a federal claim and a state claim arise out of the same substratum of facts, the state claim falls to be decided within the same 'matter' of federal jurisdiction as the federal claim, and is determined with an exercise of Commonwealth judicial power. While there has been much concern expressed about the expansion of federal legislative powers in cases like *Tasmanian Dam*,⁴⁴ there has been little recognition that the High Court was, at the same time, expanding the jurisdictional opportunities for an exercise of Commonwealth judicial power. The expansion of these jurisdictional opportunities can be assessed through their impact, respectively, on federal courts and state courts.

2. *Accrued jurisdiction and federal courts*

The key High Court decisions in the early 1980s focused on the exercise by lower federal courts of jurisdiction over claims that otherwise would have been decided by a state court exercising state jurisdiction (for convenience, referred to hereafter as 'state-based claims'). The High Court had earlier dealt with questions of its own jurisdiction to consider state-based claims associated with claims falling within its jurisdiction. For example, in *Hopper v Egg & Egg Pulp Marketing Board (Vic)*,⁴⁵ proceedings were instituted in the High Court challenging the validity of the *Marketing of Primary Products Act 1935 (Vic)* on the basis that the relevant provisions levied an excise duty in breach of s 90 of the Constitution. The matter arose under the Constitution (and/or involved its interpretation) and, thus, the head of federal jurisdiction in s 76(i) of the Constitution, conferred on the High Court by s 30(a) of the *Judiciary Act 1903 (Cth)*, was triggered. However, the plaintiff pressed a further claim that would not otherwise have triggered federal jurisdiction if pursued on its own. The relevant state provisions required a deduction from payments owing to egg producers under the pooling scheme established by the legislation, and the plaintiff claimed that, properly

⁴¹ *Phillips Morris Incorporated v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Fencott v Muller* (1983) 152 CLR 570; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261.

⁴² *Fencott v Muller* (1983) 152 CLR 570, 603 (Mason, Murphy, Brennan and Deane JJ).

⁴³ See, eg, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 585 (Gummow and Hayne JJ); *Fencott v Muller* (1983) 152 CLR 570, 607–8.

⁴⁴ (1983) 158 CLR 1.

⁴⁵ (1939) 61 CLR 665.

construed, the legislation did not authorise such deductions. This was a state-based claim which would not otherwise have triggered federal jurisdiction. A majority of the Court held that the Court had jurisdiction to fully determine the dispute of the parties, including the non-constitutional claim.⁴⁶ The reasoning of the Court was not fully explained, but the comments of Isaacs J in the earlier case of *Pirrie v McFarlane*⁴⁷ seem to provide the justification:

The word 'matter' in sec 76 does not, of course, mean simply the particular constitutional question or other legal question which identifies the litigation with the section. ... 'Matter' means the whole controversy — the matter litigated. For instance, looking at sec 75, the 'matter' would not necessarily be simply that part of the controversy depending on the construction or effect of a treaty, or that part of the controversy relating to a consul or the Commonwealth. There might be other necessary parties and other essential questions, all of which would be factors constituting the 'matter'. The controversy is not intended to be decided piecemeal by different tribunals, State and Federal.

This *accrued jurisdiction* came into sharper contrast following the creation of the Federal Court in 1976. In particular, the conferral of exclusive jurisdiction on the Federal Court by the *Trade Practices Act 1975* (Cth) in certain matters arising under that Act raised the question of whether the Federal Court could hear related state-based claims. For example, in *Philip Morris Incorporated v Adam P Brown Male Fashions Pty Ltd*,⁴⁸ the High Court considered whether the Federal Court could hear a claim for relief for the common law tort of passing off along with the *Trade Practices Act* claims. A majority of the Court considered that it could within its accrued jurisdiction: the state claim fell within the 'matter' in relation to which the Federal Court had been given jurisdiction (that is, a matter arising under a law made by Parliament — s 76(ii)). The approach of Isaacs J from *Pirrie* finds resonance in the influential judgment of Mason J in *Philip Morris*:⁴⁹

the framers ... looked to 'matters' in the broadest sense of the term as one which would catch up, as far as possible, the controversy which parties brought for determination by a court. It is highly unlikely that they intended to embrace a narrow technical meaning which would result in undue fragmentation of a total controversy, leaving its resolution to decisions by both state courts and this Court or state courts and federal courts.

While cases on these jurisdictional issues subsided during the operational years of the cross-vesting schemes, which vested state jurisdiction in federal courts and vice versa, the invalidation of the conferral on federal courts of state jurisdiction in *Re Wakim; Ex parte McNally*⁵⁰ has given new life to the principles of accrued jurisdiction.

The consequence of these principles is that state-based claims which otherwise would have been litigated in a state court exercising state jurisdiction and power, can be litigated in a federal court if the state-based claims and federal claims are non-severable. And, significantly, the High Court has adopted a liberal view of the connection needed for a state-based claim and a federal claim to be non-severable. Importantly for the purposes of this article, the federal court determines the state-based claim with an exercise of federal judicial power.

⁴⁶ See also *Carter v Egg & Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557; *Parton v Milk Board (Vic)* (1949) 80 CLR 229.

⁴⁷ (1925) 36 CLR 170, 198 ('*Pirrie*').

⁴⁸ (1981) 148 CLR 457.

⁴⁹ *Ibid* 512–13.

⁵⁰ (1999) 198 CLR 511 ('*Re Wakim*').

3. *Accrued jurisdiction and state courts*

This centralising impact is even more pronounced in relation to state court jurisdiction. The federal Parliament, with an exercise of power under s 77(iii), can confer federal jurisdiction on state courts in relation to any of the 'matters' identified in ss 75 and 76. With some exceptions, Parliament has conferred jurisdiction on state courts in relation to all matters of federal jurisdiction that the High Court has.⁵¹

The federal jurisdiction conferred to determine these 'matters' includes the authority to determine state-based claims that fall within the federal 'matter'. And, significantly, the High Court has held that state judicial power has not survived the vesting of state courts with federal jurisdiction in relation to matters set out in ss 75 and 76. The power in s 77(ii) of the Constitution (exercised through ss 38 and 39 of the *Judiciary Act*) to define 'the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States' has been read by the Court to allow Parliament to strip state courts of state jurisdiction and invest them with federal jurisdiction under s 77(iii) to resolve the same matters.⁵²

Even when the federal provisions did not operate on their face to oust state jurisdiction in relation to a head of federal jurisdiction (for example, s 76(ii)), the survival of that remaining state jurisdiction was held to be inconsistent with the investiture of federal jurisdiction over that matter and, thus, had to give way.⁵³ Accordingly, the entire 'matter', comprising federal and state claims, is determined with an exercise of federal jurisdiction and judicial power.

4. *Other centralising principles for the operation of federal jurisdiction*

There is a range of other principles developed by the High Court that have enhanced the jurisdictional opportunities for an exercise of federal jurisdiction. First, as the High Court said in *Agtrack (NT) Pty Ltd v Hatfield*,⁵⁴ 'federal jurisdiction may be attracted at any stage of a legal proceeding'. Thus, depending on the head of federal jurisdiction in question, federal jurisdiction may be triggered at the time proceedings are instituted, when the defence is filed,⁵⁵ when written or oral submissions are presented to a court⁵⁶ or when the matter goes on appeal to an intermediate court.⁵⁷ Secondly, once federal jurisdiction is triggered in good faith, it is not lost. This will be the case even if the claim triggering federal jurisdiction is unsuccessful.⁵⁸ Thirdly, whether federal jurisdiction has been attracted is a matter of 'objective assessment': it is not 'a question of establishing an intention to engage federal jurisdiction or an awareness that this has occurred'.⁵⁹ Thus, the litigating parties cannot choose to opt out of federal jurisdiction if it is otherwise engaged.

⁵¹ *Judiciary Act* 1903 (Cth) s 39(2).

⁵² *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601; *Felton v Mulligan* (1971) 124 CLR 367.

⁵³ *Ibid.*

⁵⁴ (2005) 223 CLR 251, 262.

⁵⁵ See, eg, *Felton v Mulligan* (1971) 124 CLR 367.

⁵⁶ See, eg, *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

⁵⁷ See, eg, *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529.

⁵⁸ See, eg, *R v Carter; Ex parte Kisch* (1934) 52 CLR 221, 224 (Evatt J); *R v Bevan; Ex parte Elias & Gordon* (1942) 66 CLR 452, 466 (Starke J), 480 (Williams J).

⁵⁹ *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251, 262–3.

There is also a low jurisdictional threshold for triggering two of the important heads of federal jurisdiction — ss 76(i) and (ii). In relation to federal matters under s 76(ii), the Court has held that a matter arises ‘under any laws made by Parliament’ ‘if the right or duty in question in the matter owes its existence to federal law or depends upon federal law for its enforcement’.⁶⁰ Thus, in *LNC Industries v BMW*, the question was whether the NSW Supreme Court was exercising federal jurisdiction when considering a contractual dispute in circumstances where the subject matter of the contract was an import licence granted under Commonwealth regulations. The contract claim was a state-based claim, but the federal source of the contractual right involved was enough to trigger federal jurisdiction under s 76(ii). Amplifying the potential for s 76(ii) to be triggered is the expansive scope allowed to federal legislative power. The wider the scope of legislative power to create rights and obligations sourced in federal law, the greater the potential for disputes about those rights and obligations under federal law to be resolved with an exercise of federal jurisdiction. In turn, there is greater scope for state disputes to fall within accrued federal jurisdiction.

The jurisdiction in s 76(i) will be triggered ‘in a case in which the giving of judgment in favour of one of the parties depends upon the outcome of two or more issues of which only one involves a constitutional question’.⁶¹ This is so even if the case is decided on another basis without resolving the constitutional issue. Furthermore, the head of jurisdiction in s 76(i) will be triggered where ‘the interpretation of a provision of the Constitution is relevant to the determination of a question of statutory interpretation’, even in circumstances where the question of statutory interpretation is the only issue in the case.⁶² As long as the constitutional interpretation is ‘essential or relevant’ to the statutory construction point, then federal jurisdiction will be triggered.⁶³

5. Summary

This range of principles demonstrates the enhanced jurisdictional opportunities for an exercise of Commonwealth judicial power. The principles have expanded the reach of federal jurisdiction, both in federal and state courts. The expansion of federal jurisdiction in this way has resulted in a greater centralisation of judicial power. Furthermore, as will be explained in the next section, it has facilitated a convergence in institutional design of federal and state courts, with an exercise of federal jurisdiction being subjected to stringent separation of judicial power principles, whether in federal or state courts. Moreover, it provides the Commonwealth Parliament with the opportunity to control the exercise of that jurisdiction by choosing, under s 77(ii), to vest federal jurisdiction, embracing any claims within accrued jurisdiction, *exclusively* in federal courts. In *Stack v Coast Securities (No 9)*,⁶⁴ the High Court held that the exclusive conferral of jurisdiction under the *Trade Practices Act 1974* (Cth) did not, as a matter of construction, extend to the accrued jurisdiction falling within the matter concerned. However, presumably, Parliament might choose to do so if it so wanted.

⁶⁰ *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 154 (Latham CJ), affirmed in *LNC Industries v BMW* (1983) 151 CLR 575, 581.

⁶¹ *Attorney-General (NSW) v Commonwealth Savings Bank* (1986) 160 CLR 315, 327.

⁶² *Ibid.*

⁶³ *Ibid.*, quoting *Nelungaloo Pty Ltd v Commonwealth* [No 4] (1953) 88 CLR 529, 541.

⁶⁴ (1983) 154 CLR 261.

B Convergence of institutional design

The second way in which there has been a centralisation of judicial power has been through a convergence in institutional design. There were two distinctive institutional features of state judicial systems at 1900. The first distinctive feature was that, unlike the position at the federal level, there would be no entrenched division of power at the state level and no constitutional rules about which institution would exercise which power. The second distinctive feature was that the Privy Council would remain an integral part of state judicial systems. This section will explore how each of these distinctive features has diminished.

1. Converging constitutional constraints

Separation of judicial power principles

The High Court has developed stringent separation of judicial power principles at the federal level. Commonwealth judicial power is to be exercised only by courts referred to in s 71 of the Constitution (the *Alexander* principle),⁶⁵ and courts exercising Commonwealth judicial power can only exercise judicial power or incidental non-judicial power (the *Boilermakers* principle).⁶⁶ In developing these principles, the High Court has relied heavily on the rule of interpretation, *expressio unius est exclusio alterius*; that is, Ch III exclusively sets out the repositories of Commonwealth judicial power and is the exclusive source of power that can be exercised by courts exercising Commonwealth judicial power.⁶⁷ Consequently, the *Alexander* and *Boilermakers* principles arise as negative implications from the text of the Constitution.

Importantly, these federal separation of judicial power principles apply as limitations on the federal Parliament only. Reliance upon the textual distribution of powers in the Constitution to ground the federal separation principles presents difficulties for the application of such principles at the state level: the logic of the argument deriving from Ch III can only apply to the federal arms of government. Furthermore, state constitutions are generally not entrenched, and so it is difficult to derive similar implications from any textual distribution of powers at the state level. Thus, distinctive features of our federal system were that state government power would not be constitutionally pigeon-holed into legislative, executive or judicial categories, and there would be no fixed constitutional understanding of how state power would be distributed across arms of government. Nevertheless, as will be explained, principles have been developed which have expanded the reach of the federal separation of judicial power principles, and have imposed limitations on what powers can be given to, and perhaps taken from, state courts.

Federal courts exercise federal jurisdiction over state-based claims

As explained earlier, the High Court has developed *accrued jurisdiction* principles which have enhanced the jurisdictional opportunities for federal courts to exercise federal judicial power in relation to state-based claims that would otherwise have been determined in a state court exercising state judicial power. The opportunities for the exercise of accrued jurisdiction have been magnified by the broad approach to federal heads of *legislative* power, expanding the matters that are within the reach of s 76(ii) of

⁶⁵ *The Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.

⁶⁶ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*').

⁶⁷ See, eg, *Boilermakers* (1956) 94 CLR 254, 270.

the Constitution. Importantly, because the jurisdiction of lower federal courts, including its accrued jurisdiction, is federal jurisdiction conferred by the federal Parliament, the lower federal court must exercise its jurisdiction and power *within the constraints of the federal separation of judicial power principles*.

Separation of judicial power at the state level: when state courts exercise federal jurisdiction

As further explained earlier, the High Court has also developed principles which have enhanced the jurisdictional opportunities for state courts to exercise Commonwealth judicial power. Again, in itself, this has resulted in a centralisation of judicial power. However, in addition to expanding the opportunities for an exercise of federal jurisdiction in state courts, the High Court has developed a theory about how state laws are applied by a state court when exercising federal jurisdiction. The Court appears to have accepted the idea that state Parliaments lack the constitutional power to prescribe what laws are to apply when a court — federal or state — is exercising federal jurisdiction. As Gummow J said in *APLA Ltd v Legal Services Commissioner (NSW)*:

the exclusivity of the powers of the Parliament with respect to the conferring, defining and investing of federal jurisdiction (found in s 77 and supported by ss 78, 79 and 80) has the consequence, well recognised in the authorities that the laws of a State with respect to limitation of actions and other matters of substantive and procedural law which are ‘picked up’ by s 79 of the *Judiciary Act*, could not directly and of their own force operate in the exercise of federal jurisdiction. This generally results from an absence of State legislative power rather than the operation of s 109 of the Constitution with respect to the exercise of concurrent powers.⁶⁸

On this theory, state laws cannot apply in federal jurisdiction of their own force, and must be picked up and applied as surrogate federal law by a Commonwealth provision.⁶⁹ However, the consequence of this theory of how state laws apply in federal jurisdiction is that the federal provisions, that pick up state provisions, must comply with the federal separation of judicial power principles: if the Commonwealth Parliament cannot confer non-judicial power on state courts because of the *Boilermakers* principle, it cannot pick up state laws that confer powers of the same character. Thus, the High Court has held that such provisions will not operate to pick up functions that are ‘insusceptible of exercise as part of the judicial power of the Commonwealth’.⁷⁰

This has been highlighted most dramatically by the High Court’s decision in *Momcilovic v The Queen*:⁷¹ a decision that has unsettled the operation of the ‘dialogue’ model of rights protection in the Victorian *Charter of Human Rights and Responsibilities*

⁶⁸ *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 406, citing *Northern Territory v GPAO* (1999) 196 CLR 553, 575, 628; *Residual Assco Group Ltd v Spalvoins* (2000) 202 CLR 629, 642; *Solomons v District Court (NSW)* (2002) 211 CLR 119, 134; referring also to s 68 of the *Judiciary Act* and *R v Gee* (2003) 212 CLR 230, 255–6.

⁶⁹ The primary — although not the only — vehicles for picking up state laws in federal jurisdiction are ss 68(1) and 79(1) of the *Judiciary Act*. There may be some dispute about Commonwealth power to regulate substantive rights and duties within federal jurisdiction, but it is clear that powers used in the exercise of federal jurisdiction can be prescribed or picked up by Commonwealth law: see Graeme Hill and Andrew Beech, ‘“Picking up” State and Territory Laws under s 79 of the Judiciary Act — Three Questions’ (2005) 27 *Australian Bar Review* 25, 31–5.

⁷⁰ *Solomons v District Court (NSW)* (2002) 211 CLR 119, 135.

⁷¹ (2011) 245 CLR 1.

Act 2006 and the ACT Human Rights Act 2004. The power of the Victorian Supreme Court to make a declaration of inconsistency was considered by five High Court judges in *Momcilovic* to involve neither an exercise of Commonwealth judicial power nor incidental non-judicial power and, accordingly, could not be picked up by s 79 of the *Judiciary Act* where the Supreme Court was exercising federal jurisdiction.⁷²

In summary, the expanded reach of Commonwealth judicial power into state courts, along with the High Court's theory for how state laws are applied by state courts exercising federal jurisdiction, have allowed an increased infiltration of federal separation of judicial power principles to control and discipline the exercise of state judicial power.

Separation of judicial power at the state level – Kable principles

Although the federal separation of judicial power principles do not apply to state courts, one of the distinctive features of the Australian judicial system is that state courts are deeply embedded within the federal judicature: they are authorised by federal jurisdiction to exercise Commonwealth judicial power, and appeals are guaranteed from state Supreme Courts to the High Court.⁷³ These degrees of integration within the federal judicial system have been seen by the High Court – commencing with the decision in *Kable v Director of Public Prosecutions (NSW)*⁷⁴ – to have consequences for what state Parliaments can do with their courts. Thus, although state courts are creatures of the States, and were intended to retain a distinctive identity within the federal system, they transcend their state-based status because of their inclusion within the federal judicial system. Their role within that system has been held to qualify their separateness and distinctiveness.

The development of these principles is well covered elsewhere⁷⁵ and will not be repeated in detail here. It is enough to say that state Parliaments are prevented from conferring powers on state courts if their *institutional integrity* would be undermined. Institutional integrity has been measured at least in part by independence, impartiality and fairness.⁷⁶ It may also be the case that state Parliaments will breach these principles if they regulate in a way that is 'repugnant to the judicial process in a fundamental degree'.⁷⁷ And, importantly, state provisions that breach these

⁷² The Chief Justice of the High Court indicated a preparedness to revisit the way in which some state laws are applied in federal jurisdiction. However, there is no indication that there is wider appetite on the Court to revise these principles. See Will Bateman and James Stellios, 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Models of Human Rights' (2012) 36 *Melbourne University Law Review* 1, 36–9; Helen Irving, 'State Jurisdictional Residue: What Remains to a State Court when its Chapter III Functions are Exhausted?' (2014) 42 *Federal Law Review* 121.

⁷³ Subject to valid exceptions and regulations.

⁷⁴ (1996) 189 CLR 51 ('*Kable*').

⁷⁵ See recently, eg, Gabrielle Appleby and John Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of *Kable*' (2012) 40 *Federal Law Review* 1; Lim, above n 20.

⁷⁶ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *South Australia v Totani* (2010) 242 CLR 1; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638; *Pollentine v Bleijie* [2014] HCA 30.

⁷⁷ *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, 367 (Gummow and Bell JJ), 385 (Heydon J): where NSW legislation prevented an affected party from challenging the making of a court order, the High Court held that incompatibility with Commonwealth judicial power arose. Although comments in *Assistant Commissioner*

requirements are invalid: they do not operate to take the state body outside the concept of a 'court' for Ch III purposes. A contrary conclusion, the High Court has held, 'would ... weaken the effectiveness of the distinctive feature of Australian federalism represented by the general words of s 77(iii) of the Constitution.'⁷⁸ In other words, state Parliaments are forced to retain their existing courts and respect the constitutional requirements.

More recently, *Kable* has been further developed in *Kirk v Industrial Relations Commission of New South Wales*⁷⁹ to protect certain judicial functions that were characteristic of a state Supreme Court at 1900. If a power can be identified as characteristic of a state court, then state Parliaments are prevented from divesting state courts of that power. In *Kirk*, judicial review of government decision-making for jurisdictional error was considered a characteristic function of state Supreme Courts which could not be removed by the use of a privative clause. By so holding, the High Court recalibrated the *Kable* principle to achieve at the state level what had been achieved at the federal level by the High Court in *Plaintiff S157/2002 v Commonwealth*.⁸⁰

Thus, despite the inapplicability of the federal separation of judicial power principles at the state level, and the absence of an entrenched separation in state constitutions, the High Court has imposed *Kable* and *Kirk* limitations on state Parliaments. The *Kable* principles can be seen as imposing a miniature form of the *Boilermakers* principle on state Parliaments, and *Kirk* provides a platform for the High Court to impose a miniature form of the *Alexander* principle on state Parliaments. Accordingly, we see a convergence in institutional design.

This institutional design convergence has also been reflected in other developments of the *Kable* principles. First, in *Wainohu v New South Wales*,⁸¹ the High Court aligned the *persona designata* principles, that control the extent to which federal judges can exercise powers in their personal capacity,⁸² with an extension of the *Kable* principles to state court judges acting in their personal capacity. Secondly, there have been distinct tendencies in the *Kable* cases to reach conclusions on the application of *Kable* principles by analogising to federal separation of judicial power cases. Of course, it has been well accepted that a law that would survive the federal separation of powers principles would also survive the *Kable* principles.⁸³ However, there increasingly has been a tendency in High Court decisions to draw from federal separation of judicial power principles when reasoning to conclusions about the application of *Kable* standards.⁸⁴ Consequently, as Stephen McLeish SC has noted, 'the results of the

Condon v Pompano Pty Ltd (2013) 295 ALR 638 may suggest that this test has fallen out of favour with a majority of the Court: [138], [169] (Hayne, Crennan, Kiefel and Bell JJ).

⁷⁸ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 544 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

⁷⁹ (2010) 239 CLR 531 ('*Kirk*').

⁸⁰ (2003) 211 CLR 476.

⁸¹ (2011) 243 CLR 181.

⁸² *Grollo v Palmer* (1995) 184 CLR 348; *Hilton v Wells* (1985) 157 CLR 57; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

⁸³ *Baker v The Queen* (2004) 223 CLR 513; *Silbert v DPP (WA)* (2004) 217 CLR 181; *HA Bachrach Pty Limited v Queensland* (1998) 195 CLR 547.

⁸⁴ *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, 352–6 (French CJ); *South Australia v Totani* (2010) 242 CLR 1, 20, 50 (French CJ), 63–5 (Gummow J), 82–90 (Hayne J), 155–9 (Crennan and Bell JJ), 162–3, 170 (Kiefel J); *Hogan v Hinch* (2011) 243

application of the *Kable* principle are beginning to converge with the results that might be reached by applying a separation of powers approach'.⁸⁵

In summary, despite the inapplicability of the federal separation of power principles to the States, and the absence of an entrenched separation at the state level, the High Court has eroded this distinctiveness of state judicial systems.

2. The 'autochthonous expedient' as a further constraint

In addition to the constraining effects of the *Kable* principles, the investiture of federal jurisdiction in state courts pursuant to s 77(iii) of the Constitution may well present practical obstacles for experimentation with dispute settlement institutions at the state level. Questions have arisen as to whether state non-judicial *tribunals* can exercise judicial power in circumstances that would fall within a matter of federal jurisdiction set out in ss 75 and 76 of the Constitution.

For example, in *Commonwealth v Anti-Discrimination Tribunal (Tasmania)*,⁸⁶ a question arose whether the Tasmanian Anti-Discrimination Tribunal could make binding orders against the Commonwealth for breaches of the *Anti-Discrimination Act 1988* (Tas). Such a claim would be heard in federal jurisdiction (having its source in s 75(iii)) if it were determined by a state court (state courts having been authorised to determine such matters by s 39(2) of the *Judiciary Act*). Kenny J of the Federal Court considered that the Tasmanian tribunal was not a 'court' that could resolve such a dispute with an exercise of Commonwealth judicial power and, thus, could not determine the claim against the Commonwealth.⁸⁷

Of course, questions have already arisen, and will continue to arise, as to whether a tribunal is a 'court' for Ch III purposes. However, this line of cases suggests that the States may well face practical constraints when designing their dispute settlement systems in ways that shift judicial power from courts to bodies that do not satisfy the constitutional description of a 'court'.

3. Increased federal control over procedure and process

In addition to these convergences in the constitutional constraints applicable to federal and state courts, there has also been increased potential for federal control over judicial procedures and processes. The expanded opportunities for the exercise of federal *accrued* jurisdiction — both in federal and state courts — have enabled greater control

CLR 506, 551 (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 95 (Gummow J, with Hayne J agreeing), 185 (Heydon J). Although, the High Court has more recently emphasised the importance of keeping the principles separate: *Pompano* (2013) 295 ALR 638, [125] (Hayne, Crennan, Kiefel and Bell JJ); *Pollentine v Bleijie* [2014] HCA 30, [42].

⁸⁵ McLeish, above n 19, 255 (emphasis in original).

⁸⁶ (2008) 169 FCR 85.

⁸⁷ The other members of the Full Court did not consider the question. Cf the contrary conclusion of Heerey J in *Commonwealth v Wood* (2006) 148 FCR 276. Similar issues have been considered with differing outcomes in *Owen v Menzies* [2013] 2 Qd R 327 and *Sunol v Collier* (2012) NSWLR 619. On these issues, see David Rowe, 'State Tribunals within and without the Integrated Federal Judicial System' (2014) 25 *Public Law Review* 48; Geoffrey Kennett, 'Fault Lines in the Autochthonous Expedient: The Problem of State Tribunals' (2009) 20 *Public Law Review* 152.

by the federal Parliament of the procedures and processes through which the disputes (otherwise state, but now federal) are determined.

This is most obvious in the case of federal courts where the Commonwealth Parliament has exclusive control of the constitution and organisation of federal courts and their procedures and processes. But even in the case of state courts exercising federal jurisdiction, the Commonwealth Parliament exerts, or has the potential to exert, substantial control over the exercise of that jurisdiction. Although the Parliament 'must take the State court as it finds it',⁸⁸ and is bound to accept 'the constitution of the Court' and the 'organisation through which its jurisdiction and powers are exercised',⁸⁹ Parliament can regulate the practice and procedure to be followed, and the rules of evidence to be applied, when the state court is exercising federal jurisdiction. The Commonwealth Parliament also can prescribe the number of judges who can hear a federal matter,⁹⁰ and the class of state court officers who can exercise federal jurisdiction.⁹¹ The Commonwealth Parliament has generally provided for the picking-up of state rules of practice, procedure and evidence to matters of federal jurisdiction when heard in state courts.⁹² However, its power to apply different rules is undoubted, leading to an increase in Commonwealth power over state courts.

4. *Appellate pathways – the Privy Council and state judicial systems*

It is well known that the respective place of the High Court and the Privy Council at the apex of the Australian judicial systems was deeply controversial. While the driving forces behind the federal movement sought to create the High Court as the ultimate court of appeal from all Australian courts, this proposal encountered resistance from the Imperial government, convention delegates, state Supreme Court judges and lobby groups, all favouring a retention of Privy Council appeals, particularly from state courts.⁹³

Compromises had already been made by the time the Australian delegates presented their draft constitution to the Imperial government in 1900 for enactment by the Imperial Parliament. In the proposal presented to the Imperial government, the High Court was intended to have the final word on constitutional questions (other than those raising imperial interests). Although appeals could go to the Privy Council from state courts, appeals on constitutional questions were to go to the High Court. Furthermore, although appeals could be taken from the High Court to the Privy Council if Her Majesty in Council granted special leave, Parliament was given the power to limit 'the matters in which such leave may be asked'.⁹⁴

The response of the Imperial government to the Australian proposal is well known,⁹⁵ and s 74 of the Constitution was amended before its enactment to preserve a greater role for the Privy Council. With appropriate leave, appeals could be taken from

⁸⁸ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 75.

⁸⁹ *Le Mesurier v Connor* (1929) 42 CLR 481, 404.

⁹⁰ *Commonwealth Constitution* s 78.

⁹¹ See, eg, *Troy v Wrigglesworth* (1919) 26 CLR 305, where federal jurisdiction was required to be exercised by a police magistrate, not justices of the peace.

⁹² See especially ss 68(1) and 79(1) of the *Judiciary Act*.

⁹³ See *Stellios*, above n 40, ch 1.

⁹⁴ *Official Report of the National Australasian Convention Debates*, Melbourne, 1898, 2536.

⁹⁵ *La Nauze*, above n 36, ch 16; *Williams*, above n 30, 1160–8.

the High Court and state courts to the Privy Council, although Parliament could 'make laws limiting the matters in which such leave may be asked ...' from High Court appeals. As far as constitutional cases were concerned, the High Court could only control appeals raising questions 'as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional Powers of any two or more States'. Such appeals could only go to the Privy Council if the High Court granted a certificate.

Thus, at federation, the Privy Council continued to play an important role in the Australian judicial systems – federal and state. This was particularly the case in relation to state court appeals, with litigants given the option of choosing the Privy Council as the ultimate court of appeal in all cases – whether exercising state jurisdiction or federal jurisdiction (including those involving constitutional questions).

However, embedded within the provisions of Ch III was the power of the federal Parliament to make matters triggering *federal jurisdiction* exclusive to federal courts. Pursuant to ss 77(ii) and (iii), Parliament could make matters of federal jurisdiction exclusive to federal courts, thereby removing the opportunities for appeals to be taken to the Privy Council from state courts. This design was not accidental: the historical record shows that this was part of the compromise to resolve the deeply divisive issue of Privy Council appeals.⁹⁶

Despite this constitutional design, Parliament instead vested federal jurisdiction in state courts, but required any appeals in federal jurisdiction to be taken to the High Court. This attempt to limit the role of the Privy Council in state court federal jurisdiction cases resulted in a series of state court, High Court and Privy Council decisions tussling for the control of federal jurisdiction.⁹⁷ There is no need to cover that territory again here. It is enough to say that, while state courts and the Privy Council resisted the Parliament's attempts to channel federal jurisdiction appeals to the High Court, the High Court resolutely upheld the validity of Parliament's attempts to limit Privy Council appeals from state courts exercising federal jurisdiction.⁹⁸

Thus, rather than forcing Parliament to utilise lower federal courts for the exercise of federal jurisdiction as contemplated by the constitutional scheme, the High Court instead endorsed Parliament's attempt to limit the role of the Privy Council as the ultimate court of appeal from state courts when exercising federal jurisdiction, thereby eroding the distinctive institutional design of state court systems.

C Uniformity of outcome

The discussion so far has shown how High Court decisions have expanded the jurisdictional opportunities for an exercise of Commonwealth judicial power and resulted in a convergence in institutional design of federal and state courts and a centralisation of power over judicial procedure and processes. In those respects, the *national* features of Ch III have been amplified and the *confederal* features (ie, state distinctiveness) have diminished. This centralising pattern can also be seen in the increased uniformity in the legal rules applied in federal and state courts. This can be seen in three ways.

⁹⁶ La Nauze, above n 36, 267–8, 304.

⁹⁷ See Stellios, above n 40, 34–47.

⁹⁸ See *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087.

1. *One common law*

First, largely because of the place of the High Court at the apex of the integrated judicial hierarchy, it has been accepted that there is one common law throughout Australia. Thus, within our federal system, there is no possibility for divergent common law rules across federal and state courts. This was explained by Gaudron, Gummow and Hayne JJ in *Lipohar v The Queen*⁹⁹ as a necessary consequence of the doctrine of precedent and the place of the High Court at the apex of the Constitution under s 73 of the Constitution:

Whatever may once have been the case in England the doctrine of precedent is now central to any understanding of the common law in Australia. To assert that there is more than one common law in Australia or that there is a common law of individual States is to ignore the central place which precedent has in both understanding the common law and explaining its basis. This Court is placed by s 73 of the Constitution at the apex of a judicial hierarchy to give decisions upon the common law which are binding on all courts, federal, State and territorial.¹⁰⁰

In his influential work on the common law foundations of the Constitution,¹⁰¹ Sir Owen Dixon had advanced the view that '[w]e act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute'.¹⁰² For Sir Owen, this was a point of distinction between federalism in the United States and federalism in Australia. Federalism, American-style, treats the common law as emanating from the separate sovereign status of the States, whereas the federal system in Australia was born into a unitary common law. The duty of all courts in Australia, Sir Owen said, was to recognise the common law as 'one system which should receive a uniform interpretation and application, not only throughout Australia but in every jurisdiction of the British Commonwealth where the common law runs'.¹⁰³ The anterior operation of the common law in Australia made it 'possible for an Australian to regard his country as governed by a single legal system ... composed of the common law, modified by the enactments of various legislatures'.¹⁰⁴ It was, in his view, an 'instinctive faith in the unity of the system and in the consequent need of uniform interpretations' that saw the establishment of the High Court as a general court of appeal.¹⁰⁵ Indeed, with this commitment to a unitary system of law, Sir Owen considered that the framers were misplaced in adopting 'the American distinction between State and Federal jurisdiction'. Instead, a judicial system might have been created, 'which was neither State nor Federal but simply Australian',

⁹⁹ (1999) 200 CLR 485, 505.

¹⁰⁰ Ibid (footnotes omitted). Gleeson CJ (at 24) and Kirby J (at 552) agreed that there is one common law in Australia. See also *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 518; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562–6.

¹⁰¹ See 'Address by the Hon Sir Owen Dixon, KCMG to the Section of the American Bar Association for International and Comparative Law' (1943) 17 *Australian Law Journal* 138 and 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240.

¹⁰² Dixon, 'Address by the Hon Sir Owen Dixon, KCMG to the Section of the American Bar Association for International and Comparative Law', above n 101, 241.

¹⁰³ Dixon, 'The Common Law as an Ultimate Constitutional Foundation', above n 101, 139.

¹⁰⁴ Ibid 140.

¹⁰⁵ Ibid.

to administer the totality of the law.¹⁰⁶ These views were referred to with approval in High Court judgments establishing the proposition that there is one common law in Australia.¹⁰⁷

It is not the purpose of this article to challenge or critique this view. As Professor Zines has said, 'the evidence by and large shows that at the time of federation the common law was conceived as a single body of law'.¹⁰⁸ Instead, the purpose of this article is simply to note that it was not the only view that was taken at the time of federation or which has been taken since. Andrew Inglis Clark, one of the Constitution's chief architects, was of the view that the common law would be part of the law of each State.¹⁰⁹ In a paper written in 1995, Justice LJ Priestley expressed a similar view: 'There is no reason why variant judicial decisions on common law rules may not occur in different States and thus create divergences in the common law of the States.'¹¹⁰

The comments of both Inglis Clark and Justice Priestley were relied upon by Callinan J in *Lipohar* when rejecting the majority's conclusion that there is one common law:

This nation remains a federal nation. Power, legislative, executive and judicial is divided among federal, State and Territory parliaments. ... It is not an opinion universally held in this country that power and authority should inexorably accrue in all, or indeed, most matters to the central organs of government.¹¹¹

For Callinan J, each State should have its own common law rules, otherwise 'the autonomy' of the States would 'be eroded'.¹¹² Although the High Court, as the ultimate court of appeal, would naturally have a harmonising effect on state common law rules, 'in the meantime, the common law applied in the States [would] be that ... stated to be the law by the respective Courts of Appeal and Full Courts'.¹¹³

There is merit in this alternative view. Sir Owen's conception was based, in large part, on the unified common law throughout the Commonwealth. But, by the late 1960s, the Privy Council had accepted that the common law might develop divergently in different parts of the Commonwealth.¹¹⁴ If it can fracture in this way, there is merit in the view that it can fracture even further within a federal judicial system. However, the point for present purposes is that the acceptance of one common law for Australia, determined by the High Court, further facilitates the centralisation of judicial power.

¹⁰⁶ Ibid.

¹⁰⁷ For a review of this influence, see Leslie Zines, 'The Common Law in Australia: Its Nature and Constitutional Significance', (Law and Policy Paper No 13, Centre for International and Public Law, 1999), reprinted in (2004) 32 *Federal Law Review* 337.

¹⁰⁸ Ibid 5.

¹⁰⁹ Andrew Inglis Clark, *Studies in Australian Constitutional Law* (1901) 192.

¹¹⁰ LJ Priestley, 'A Federal Common Law in Australia?' (1995) 6 *Public Law Review* 221, 232. The same view was expressed by Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Lawbook, 5th ed, 1976) 58–60.

¹¹¹ (1999) 200 CLR 485, 576.

¹¹² Ibid 583.

¹¹³ Ibid 582.

¹¹⁴ See *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221, 238.

2. Rules of precedent

The second way in which uniformity of outcome has been achieved is through the adoption of rules of precedent that minimise diversity of common law rules arising across lower courts prior to the High Court's final determination of those rules. This was made clear by five members of the High Court in *Farah Constructions Pty Limited v Say-Dee Pty Limited*:¹¹⁵

Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. Since there is a common law of Australia rather than each Australian jurisdiction, the same principle applies in relation to non-statutory law.

3. Choice of law rules

The third way in which uniformity of outcome across Australian courts has been achieved is through the adoption of choice of law rules that are designed to achieve uniformity. Thus, for example, the *lex loci delicti* has been favoured as the choice of law rule to decide intra-national tort cases.¹¹⁶ In deciding upon the *lex loci delicti* in *John Pfeiffer Pty Ltd v Rogerson*, the High Court took account of the following Ch III features: 'the existence and scope of federal jurisdiction, including the investment of State courts with federal jurisdiction pursuant to s 77(iii) of the Constitution' and the position of the High Court 'as the ultimate court of appeal, not only in respect of decisions made in the exercise of federal jurisdiction'.¹¹⁷

The decision in *Pfeiffer* resolved the division in the Court, that had appeared in earlier cases, about the nature of the federal legal system. Some judges viewed the legal system as a unitary one, while others viewed the federal system as a collection of legally independent States. This division reflected the familiar federal tension between the pursuit of uniform outcomes across state courts, and the preservation of the capacity of States to prescribe diverging legal standards to be applied in forum courts.

Prior to *Pfeiffer*, the view favoured by a majority in *McKain v R W Miller & Company (SA) Pty Ltd*¹¹⁸ and *Stevens v Head*¹¹⁹ was the mutual legal independence of the States. To preserve the capacity of States to determine the law to be applied in state courts, the majority in those cases adopted the double actionability rule as the appropriate choice of law rule. The Court in *Pfeiffer*, however, rejected that position, and in doing so favoured a unitary understanding of the federal legal system. The Court pointed to the *integrating* features of Ch III that privileged uniformity of outcome and, for the Court, required the application of the *lex loci delicti*.¹²⁰

¹¹⁵ (2007) 230 CLR 89, 151–2.

¹¹⁶ *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 ('*Pfeiffer*').

¹¹⁷ *Ibid* 535.

¹¹⁸ (1991) 174 CLR 1.

¹¹⁹ (1993) 176 CLR 433.

¹²⁰ Where a court is exercising federal jurisdiction, state laws must be picked up and applied by federal provisions — notably ss 79 and 80 of the *Judiciary Act*. The uniformity in outcome was achieved by turning first to s 80 to pick up choice of law rules, and then to s 79 only if necessary (See *Blunden v Commonwealth* (2003) 218 CLR 330, 338–9; *Pfeiffer* (2000) 203 CLR 503, 529–32). The High Court's choice to sequence the application of ss 79 and 80 in this way was of great significance. A reversal of the order of ss 79 and 80, as favoured by Brennan CJ in *Commonwealth v Mewett* (1997) 191 CLR 471, 492–3, would have resulted in

Of course, the *lex loci delicti* rule only picks up the substantive law of the place of tort. Forum procedural laws continue to be applied by state courts. However the High Court has considerably narrowed the potential for real divergences in substantive outcomes across state courts by adopting a wide view of which laws are substantive in character. A law will be substantive if it affects 'the existence, extent or enforceability of the rights or duties of the parties'.¹²¹ Thus, statutes of limitation and legislative caps on damages, considered prior to *Pfeiffer* to be procedural in nature, are now considered to be substantive. Consequently, the potential for divergent outcomes is considerably reduced.

D Summary

One aspect of the centralisation of judicial power in Australia has been the uniformity of outcomes that has been achieved across Australian courts. This uniformity has been achieved by the High Court's acceptance of a single system of common law rules applicable in Australia, the adoption of rules of precedent that smoulder diversity of common law rules across lower courts, and the development of choice of law rules that result in uniform outcomes across Australian courts. Along with the expansion in jurisdictional opportunities for the exercise of Commonwealth judicial power and the convergence in institutional design of Australian courts, the achievement of uniform outcomes further demonstrates the increased centralisation of judicial power in the Australian judicial system. On the whole, the *national* features of Ch III have been promoted and enhanced, and the *confederal* have diminished.

E Traffic going the other way

It should be acknowledged that the High Court has recognised the distinctiveness of state courts in some contexts: three of which should be emphasised. First, as already mentioned, the Commonwealth must take a state court 'as it finds' it. As Gummow, Hayne and Crennan JJ said in *Forge v Australian Securities and Investments Commission*:¹²² '[t]he provisions of Ch III do not give power to the federal Parliament to affect or alter the constitution or organisation of State courts.' Thus, although the Commonwealth Parliament may vest federal jurisdiction in state courts and, to that end, define the scope of that jurisdiction and regulate the procedure and rules of evidence to be applied when the jurisdiction is exercised,¹²³ it cannot regulate the constitution or organisation of state courts.¹²⁴

However, this recognition represents no more than a minimum core of constitutional protection for state courts against an unbridled application of the reasoning in the *Engineers Case*.¹²⁵ It is a minimum core that aligns with the conception of the state immunity doctrine developed by Dixon J in *Melbourne Corporation v Commonwealth*.¹²⁶ This is well demonstrated by the differing positions adopted by

forum favouritism and a lack of uniform outcomes. For a more detailed analysis of these issues, see James Stellios, 'Choice of Law and the Australian Constitution: Locating the Debate' (2005) 33 *Federal Law Review* 7.

¹²¹ *Pfeiffer* (2000) 203 CLR 503, 543.

¹²² (2006) 228 CLR 45, 75.

¹²³ See, eg, *Russell v Russell* (1976) 134 CLR 495.

¹²⁴ See, eg, *Le Mesurier v Connor* (1929) 42 CLR 481.

¹²⁵ (1920) 28 CLR 129.

¹²⁶ (1947) 74 CLR 31.

Isaacs J and Dixon J in *Le Mesurier v Connor*:¹²⁷ a case concerning Commonwealth attempts to appoint a federal officer as the Bankruptcy Registrar of the Supreme Court of Western Australia when exercising federal bankruptcy jurisdiction. A narrow majority of the Court (Knox CJ, Rich and Dixon JJ; Isaacs and Starke JJ dissenting) held the Commonwealth provisions to be invalid for altering the constitution of the Court. By contrast, Isaacs J concluded that the majority's view was inconsistent with the 'occasionally forgotten' *Engineers Case*.¹²⁸ The position was well put by Brendan Lim in the following way:

State judicial institutions are understood to be components of the states in their constitutional conception, at least in the sense that a state's capacity to function as a government is understood to include the capacity to organise 'its own' courts and 'its own' judges.¹²⁹

Secondly, the High Court held in *Re Wakim*¹³⁰ that state judicial power cannot be conferred on federal courts. While Ch III allows the federal Parliament to confer federal jurisdiction on state courts to exercise Commonwealth judicial power, there is no constitutional facility for state Parliaments to confer state jurisdiction on federal courts. Nor is there a constitutional facility for the federal Parliament to consent to such a conferral. It is now well known that, in *Re Wakim*, the High Court held that the express provision of Commonwealth power to invest state courts with federal jurisdiction gave rise to a negative implication that the reverse was not constitutionally permissible.

At first glance, the decision appears to quarantine state jurisdiction for exercise by state courts, thereby protecting and preserving the distinctiveness of state judicial power. However, in areas where there are political priorities for uniform schemes, the consequence of *Re Wakim* is to further enhance the potential for the replacement of state jurisdiction with federal jurisdiction. The circumstances considered in *Re Wakim* provide the perfect illustration. Uniformity in corporate regulation in Australia has been a long-standing political objective. Prior to *Re Wakim*, this uniformity was achieved by a co-operative arrangement across federal and state jurisdictions. Using its territories power in s 122 of the Constitution, the Commonwealth enacted a Corporations Law for the Australian Capital Territory. The text of that Corporations Law was then picked up by legislation in each State. The disputes that arose under those state Acts were disputes arising under state laws and usually¹³¹ determined with an exercise of state judicial power.

Central to this co-operative Corporations Law scheme was the cross-vesting of jurisdiction: the vesting of federal jurisdiction in state courts and the vesting of state jurisdiction in federal courts. The cross-vesting of jurisdiction was designed to ensure that Corporations Law disputes were determined by the court in question without complicated jurisdictional issues arising.

¹²⁷ (1929) 42 CLR 481.

¹²⁸ Ibid 512.

¹²⁹ Lim, above n 20, 36, citing the state immunity case of *Austin v Commonwealth* (2003) 215 CLR 185.

¹³⁰ (1999) 198 CLR 511.

¹³¹ Leaving aside instances where federal jurisdiction was attracted in some way other than s 76(ii) of the Constitution.

The consequence of the decision in *Re Wakim* was the referral of legislative power by the States to the Commonwealth Parliament for the enactment of a uniform corporations law in reliance on the referral power in s 51(xxxvii). This was achieved with the enactment of the *Corporations Act 2001* (Cth). Importantly, for present purposes, the disputes that arise under the *Corporations Act* give rise to matters of federal jurisdiction (embracing any state claims within accrued jurisdiction) under s 76(ii) of the Constitution and are determined by courts – whether federal or state – with an exercise of Commonwealth judicial power. The disputes that were, prior to *Re Wakim*, determined in state jurisdiction, are now determined in federal jurisdiction according to the disciplines imposed by the federal separation of judicial power principles, and the procedures and processes through which the disputes are resolved are now subject to federal control.

Thirdly, in deciding whether non-judicial officers of state courts could exercise the judicial power of the Commonwealth when vested in the relevant state court, the High Court initially took an approach protective of Commonwealth judicial power. The state ‘court’ that could exercise Commonwealth judicial power was said to be composed of judicial officers, and only judicial officers could exercise that power.¹³²

However, in *Commonwealth v Hospital Contribution Fund*,¹³³ the High Court rejected this earlier approach, instead preferring the dissenting view of Gibbs J in *Kotsis* that the expression state ‘courts’ is ‘meant to refer to State courts with the organization and structure provided by State law’, including non-judicial officers.¹³⁴ In explaining the adoption of the new approach, Mason J referred to the ‘great inconvenience to the States and their courts if the structure and composition of a State court for the exercise of federal jurisdiction is to differ from that selected by the State for the exercise of its similar non-federal jurisdiction’.¹³⁵ Requiring state courts to be structured to satisfy federal separation of judicial power principles when exercising federal jurisdiction would place considerable pressure on state Parliaments to design state courts in the image of federal courts. This, for Mason J, would ‘constrain the States’ freedom of action in the organization of their courts’.¹³⁶

Nevertheless, even here, there is convergence with the design of federal courts. In *Harris v Caladine*,¹³⁷ the Mason Court held that non-judicial officers of federal courts could exercise the judicial power of the Commonwealth, and in supporting that view, a majority of the Court drew support from the *Hospital Contribution Fund* case allowing non-judicial officers of state courts to exercise Commonwealth judicial power.¹³⁸ Thus, the lack of symmetry in the principles led to the ratcheting down of federal principles to achieve convergence.

In summary, although the High Court, in some respects, has been protective of the distinctiveness of state judicial power and state courts, those occasions are relatively few and their impact cannot to be overstated.

¹³² *Kotsis v Kotsis* (1970) 122 CLR 69; *Knight v Knight* (1971) 122 CLR 114.

¹³³ (1982) 150 CLR 49 (*Hospital Contribution Fund*).

¹³⁴ *Kotsis v Kotsis* (1970) 122 CLR 69, 110.

¹³⁵ (1982) 150 CLR 49, 62.

¹³⁶ *Ibid.*

¹³⁷ (1991) 172 CLR 84.

¹³⁸ *Ibid.* 93 (Mason CJ and Deane J), 122 (Dawson J), 151 (Gaudron J). While generally supportive of the majority view, McHugh J disapproved of the analogy (at 157).

V REASONS FOR THE CENTRALISING TRENDS

The article so far has sought to identify the centralising trends within the Australian judicial system. This has been a descriptive account of the complexion of *judicial federalism* in Australia. It is an account that largely tracks the centralising trends documented in other areas of Australian federalism, particularly *legislative* and *fiscal* federalism.

This final part of the article seeks to identify reasons for the centralising trends. The article does not seek to assess whether Australian judicial federalism has taken an ideal form: that is a much larger question. The purpose of this section is more modest: to identify the explanations apparent from the cases for these centralising trends. This section will offer three explanations: first, the centralising force of nation-building; secondly, rule of law concerns for litigants arising from multiple legal systems within a federal system; and, thirdly, the desire to give the federal Parliament a real and effective choice between federal and state courts for the exercise of federal jurisdiction.

A Nation-building

As highlighted earlier, an expansion of federal jurisdiction has provided the platform for a centralisation of judicial power. The early cases exhibiting a preference for expansive federal jurisdictional principles were decided against the background of the delicate relationship between the High Court and the Privy Council discussed earlier.

In what is, perhaps, the first indication of an expansive jurisdictional principle, Isaacs J said in *Pirrie* that ‘matter’ should be read broadly to allow resolution of the whole dispute between the parties. This statement was made in the course of considering the validity of ss 38A, 40A and 41 of the *Judiciary Act*, which had been enacted in response to the congestion of state court, Privy Council and High Court decisions on the question of whether Parliament could prevent appeals going to the Privy Council from state courts exercising federal jurisdiction. Following a tense exchange of judicial opinion, in 1907 Parliament enacted those provisions to require *inter se* questions in state courts to be transferred to the High Court. Of course, for this mechanism to work, it was important to know when an *inter se* question was raised in a state court. Having set out the paragraph quoted earlier, Isaacs J concluded: ‘If, then, the “matter” is once identified as falling under one or other of the specified heads, it is part of the judicial power of the Commonwealth, and may be dealt with as the Commonwealth Parliament has dealt with such matters in the sections under review’.¹³⁹

The early approach for determining whether an *inter se* question had arisen before a court for the purposes of s 40A of the *Judiciary Act* was a narrow one. For s 40A to operate, the *inter se* question did not ‘arise’ unless its determination was necessary in order to dispose of the case.¹⁴⁰ Similarly, in the earlier decisions of the High Court, a matter did not involve the interpretation of the Constitution under s 76(i) unless the matter presented ‘necessarily and directly and not incidentally an issue upon its interpretation’.¹⁴¹ These narrower approaches, however, eventually ‘gave way’¹⁴² to

¹³⁹ (1925) 36 CLR 170, 198.

¹⁴⁰ *R v Maryborough Licensing Court; Ex parte Webster & Co Ltd* (1919) 27 CLR 249.

¹⁴¹ *James v South Australia* (1927) 40 CLR 1, 40.

¹⁴² *Attorney-General (NSW) v Commonwealth Savings Bank* (1986) 160 CLR 315, 326.

broader views. Thus, an *inter se* question was later considered to arise as soon as it appeared that the case 'can be resolved by deciding that question, even if it might ultimately prove possible, by answering other questions, to dispose of the case without determining the *inter se* question itself'.¹⁴³ As Kitto J recognised in *Lansell v Lansell*, the purpose of s 40A supplemented the operation of s 74 of the Constitution:

The evident purpose of s 40A, after all, is to supplement the provision made by s 74 of the Constitution in furtherance of the 'high policy' of reserving 'for the jurisdiction of (the) High Court the solution of those *inter se* questions which were of such vital importance to Commonwealth and States alike'. I take it to be the purpose of s 40A to prevent the Supreme Court of a State from pronouncing a judgment (which may be carried by direct appeal to the Privy Council) in any cause in which it has become apparent that s 74 of the Constitution would have precluded an appeal to the Privy Council in the absence of a certificate if the court had been the High Court. Unless the view above suggested as to when an *inter se* question arises is correct, this purpose must largely fail.¹⁴⁴

These expansive *inter se* principles were used by Stephen, Mason, Aickin and Wilson JJ in *Moorgate Tobacco Co Ltd v Philip Morris Pty Ltd*¹⁴⁵ to support a broad view of federal jurisdiction which would prevent, according to s 39(2)(a) of the *Judiciary Act*, an appeal to the Privy Council. Their Honours considered that, once federal jurisdiction is triggered, it is 'not lost by subsequent disclaimer or by the primary judge's failure to decide the matter'.¹⁴⁶ In supporting their broad view of the federal jurisdictional point, their Honours looked to the 'analogy'¹⁴⁷ of *inter se* cases.

The operation of s 39(2)(a) of the *Judiciary Act* was also the context for the Court's decision in *LNC Industries v BMW*¹⁴⁸ to take a broad view of when a matter arises under a federal law for the purposes of s 76(ii). Similarly, in *Felton v Mulligan*,¹⁴⁹ where the Court held that state jurisdiction is displaced in circumstances where it has been given federal jurisdiction to resolve the dispute, the question was whether s 39(2)(a) prevented an appeal to the Privy Council.

The rationale underlying the *inter se* cases was also relied on by the Court in *Attorney-General (NSW) v Commonwealth Savings Bank*¹⁵⁰ to support a more expansive view of when a matter arises under s 76(i) of the Constitution. Consequently, as already noted, the Court considered that a matter arose under s 76(i) even though the case was disposed of without the constitutional issue being determined or where the constitutional question was relevant to a question of statutory construction. The issue in *Attorney-General (NSW) v Commonwealth Savings Bank* was not whether an appeal to the Privy Council should be prevented by s 39(2)(a) of the *Judiciary Act*. Rather, the question was whether a matter arising under the Constitution or involving its interpretation could be removed to the High Court under s 40 of the *Judiciary Act*. Nonetheless, the Court relied upon the same rationale that was put forward to justify curtailing Privy Council appeals.

¹⁴³ Ibid 327, referring to *Lansell v Lansell* (1964) 110 CLR 353, 357-9; *Moorgate Tobacco Co Ltd v Philip Morris* (1980) 145 CLR 457, 476-7.

¹⁴⁴ *Lansell v Lansell* (1964) 110 CLR 353, 358.

¹⁴⁵ (1980) 145 CLR 457.

¹⁴⁶ Ibid 477.

¹⁴⁷ Ibid 476.

¹⁴⁸ (1983) 151 CLR 575.

¹⁴⁹ (1971) 124 CLR 367.

¹⁵⁰ (1986) 160 CLR 315, 327.

The elevation of the High Court to the apex of Australian judicial systems has, in fact, taken on a centralising life of its own. There is one common law of Australia, and the position of the High Court 'as the final appellate court for the country, is the means by which that unity in the common law is ensured'.¹⁵¹ However, as Stephen McLeish SC has noted, even 'when the Privy Council sat at the apex of a judicial hierarchy for all British colonies, it did so notwithstanding that the same common law did not apply across the Empire'.¹⁵² Ironically, within a decade or so of asserting its authority to deviate from English common law, the High Court denied the possibility of the common law further fracturing into separate state common law systems.

Additionally, in *Mellifont v Attorney-General (Qld)*,¹⁵³ the High Court relaxed the approach for determining what judgments could be appealed to the High Court under s 73 from state courts, so as to facilitate the role of the High Court at the apex of the judicial system. Prior to *Mellifont*, a state Supreme Court judgment could only be appealed to the High Court if it 'finally determined the rights of the parties'.¹⁵⁴ This approach had significant consequences for well-established provisions for lower courts to refer questions of law or state a case to a state Supreme Court. Because the answers to the questions would not, themselves, resolve the dispute between the parties, the Supreme Court's answers could not be taken on appeal to the High Court under s 73. The consequence that limited approach had for the role of the High Court 'as the final appellate court of the nation'¹⁵⁵ prompted the Court in *Mellifont* to broaden the Court's appellate jurisdiction. What may have been an opportunity to allow for a distinctive voice at the state Supreme Court level, was removed by an expansion of the High Court's appellate jurisdiction.

In summary, nation-building can be said to be the earliest explanation for an expansion in federal jurisdiction. The desire to minimise the role of the Privy Council in relation to *inter se* questions filtered through to an expansive view of when federal jurisdiction is triggered, with the consequence that s 39(2)(a) of the *Judiciary Act* had a broader field of operation to prevent appeals to the Privy Council in matters of federal jurisdiction. This underlying rationale was not always made explicit in High Court judgments, and seemed to have been transferred from the context of Privy Council appeals to High Court removals. Nonetheless, it is clear that the minimisation of the role of the Privy Council provides a clear explanation for the early development of an expanding field of federal jurisdiction. And, the elevation of the High Court to the apex of Australian judicial systems has, itself, had an important centralising effect.

B Rule of law

Dixon J famously said that the rule of law is an assumption upon which the Constitution rests.¹⁵⁶ It is not entirely clear what that means as a general proposition.

¹⁵¹ *Re Wakim* (1999) 198 CLR 511, 574 (Gummow and Hayne JJ).

¹⁵² McLeish, above n 19, 263.

¹⁵³ (1991) 173 CLR 289 ('*Mellifont*').

¹⁵⁴ *Swiss Aluminium Australia Ltd v Federal Commissioner of Taxation* (1987) 163 CLR 421, 425 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

¹⁵⁵ *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 268 (Brennan J); see also at 283–4 (Deane, Gaudron and McHugh JJ).

¹⁵⁶ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

However, in the context of Ch III,¹⁵⁷ the High Court has sought to give effect to it in a number of ways. First, and perhaps most obviously, the High Court has subjected the exercise of judicial power to separation of power disciplines and the rule of law ideas that underpin them. Separation of judicial power principles have been explained in a number of ways: all of which draw from the desire to have an independent and impartial judiciary. The expansion of jurisdictional opportunities for an exercise of Commonwealth judicial power along with the rules about how state laws apply in federal jurisdiction, operate in tandem to maximise the impact of the separation of judicial power disciplines. Even beyond the reach of federal jurisdiction, *Kable* has imposed these core rule of law values on state courts. Emerging *Kirk* principles may operate to isolate traditional judicial functions within state judicial systems that are subject to such disciplines.

The cases also exhibit other rule of law principles. As has been developed, one of the perennial tensions to be accommodated within a federal system is between the *national* and the *confederal*. One of the well-accepted benefits of a centralised federal system is that of uniform outcomes irrespective of locality. This is often presented as an efficiency argument, but it is also commonly presented as one that has benefits for the individual. In the context of judicial systems, the argument manifests itself as rule of law objectives of efficiency in the administration of justice and uniform outcomes irrespective of state of residence.

There is a clear flavour of this kind of rule of law argument across many of the areas outlined earlier in the article and, indeed, sometimes a recognition that the rule of law objectives must be weighed against the distinctiveness of state judicial systems. A useful starting point is the early justification put forward for an expansive reading of the word 'matter' to include state-based claims within the accrued jurisdiction of federal courts. In *Philip Morris Incorporated v Adam P Brown Male Fashions Pty Ltd*, Mason J gave the following reason for preferring a broad interpretation of the word 'matter':

In deciding whether to attribute either a broad or a narrow content to 'matter', we should take into account that the adoption of the broad meaning will lead to the speedier determination of entire controversies between parties without undue duplication of proceedings. Perhaps the adoption of this view will have some adverse consequences for State courts, though this is by no means self-evident, but even if this be so, it is a consideration which is secondary to the interests of litigants. This circumstance is an additional reason for giving the word a broad rather than a narrow meaning.¹⁵⁸

This overt recognition of the underlying tension is also reflected in the judgment of Wilson J, who balanced the competing interests the other way in adopting a more limited view of the scope of federal jurisdiction:¹⁵⁹

I am conscious of, and burdened by, the consideration that such a conclusion may well not be in the best interests of litigants, who naturally seek convenience and economy in

¹⁵⁷ In *Thomas v Mowbray* (2007) 233 CLR 307, 342, Gummow and Crennan JJ said that '[i]t has been well said that Ch III gives practical effect to the assumption of the rule of law upon which the Constitution depends for its efficacy', citing *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 351-2 (Gleeson CJ and Heydon J). See also *South Australia v Totani* (2010) 242 CLR 1, 62-3 (Gummow J); 156 (Crennan and Bell JJ).

¹⁵⁸ (1981) 148 CLR 457, 514.

¹⁵⁹ *Ibid* 548.

the resolution of their disputes. However, burdened as I am by that consideration, it seems to me that any other decision will not only offend the true intent and operation of the Constitution as established by its proper construction but diminish its effectiveness in maintaining a viable federation.

Other clear examples are found in the recognition of one common law, the rules of precedent that operate to minimise divergence and diversity in common law rules across jurisdictions and the choice of law context. In his preference for a unified common law, Sir Owen Dixon was guided by the 'efficient administration of justice'.¹⁶⁰ His commitment to a unitary legal system led him to question the need for 'the American distinction between State and Federal jurisdiction'.¹⁶¹ The choice of law context is one where the underlying tension between uniformity and diversity is very well known. The application of different legal rules by different federal and state forums may lead to inconvenient results, increasing the costs of litigation and the expectations of the parties and their insurers.¹⁶² The adoption of the law of the place of tort by the High Court in *Pfeiffer* was said to prevent those expectations being undermined¹⁶³ and provide 'practical solutions to particular legal problems which occur in the federal system'.¹⁶⁴

Rule of law arguments also surface, although less clearly, in the *Kable* judgments to justify the imposition of Ch III limitations on state Parliaments. Of course, as has been explained already, the *Kable* principles can be, in part, explained by an infiltration of the separation of judicial power values of independence and impartiality. However, there is also a rule of law thread to this reasoning that draws support from a preference for uniform outcomes disciplined by central constitutional requirements over uncontrolled state-based exercises of judicial power. Gaudron J's rejection in *Kable* of 'different grades or qualities of justice'¹⁶⁵ reveals traces of this kind of rule of law explanation. McHugh J proposed a narrower proposition that there are not 'two grades of federal judicial power'.¹⁶⁶ However, it is Gaudron J's formulation that has found favour more recently in the majority judgments of the Court.¹⁶⁷

In these contexts, the interests of the litigants, derived from an efficient, predictable and uniform resolution of their disputes, was used to enhance the national features within Ch III at the expense of the distinctiveness of state legal and judicial systems. That is not to say that a rule of law argument should be accepted as a basis for centralising judicial power. The rule of law is notoriously an imprecise concept, and its

¹⁶⁰ Dixon, 'Address by the Hon Sir Owen Dixon, KCMG to the Section of the American Bar Association for International and Comparative Law', above n 101, 140.

¹⁶¹ Ibid. See also the evidence he gave to the Royal Commission on the Constitution: Commonwealth of Australia, *Report of the Royal Commission on the Constitution* (1929) 110–11.

¹⁶² *Pfeiffer* (2000) 203 CLR 503, 536–9.

¹⁶³ Ibid 536–7, 538, 540.

¹⁶⁴ Ibid 528.

¹⁶⁵ *Kable* (1996) 189 CLR 51, 103.

¹⁶⁶ Ibid 115.

¹⁶⁷ *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638, [123]; *Wainohu v New South Wales* (2011) 243 CLR 181, 209 (French CJ and Kiefel J), 228–9 (Gummow, Hayne, Crennan and Bell JJ). See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 617–8 and *South Australia v Totani* (2010) 242 CLR 1, 37–39.

acceptance as a constitutional assumption is suggestive, but not conclusive, of any clear constitutional rule. However, there is a clear thread within the cases to that effect.

C Giving Parliament a real choice for the exercise of federal jurisdiction

Many of the developments discussed in Part IV can be explained along a very different line to the first two explanations identified so far. As a reminder, Parliament can vest federal jurisdiction in lower federal courts (s 77(i)) and/or utilise state courts for the exercise of federal judicial power (s 77(iii)). One thread that can be found in the cases is the idea that Ch III should be interpreted in a way that allows Parliament a real and effective choice when deciding to vest federal jurisdiction in federal or state courts.

The interpretation of the word ‘matter’ provides a useful entry point into this idea. As already explained, the expansive view of the word ‘matter’ was adopted initially by a majority of the Court to preference the interests of the litigants over those of the States. However, perhaps in response to claims that the majority was relying on policy—rather than legal or constitutional—analysis,¹⁶⁸ the majority shifted its justification for a broad conception of the federal justiciable controversy from the interests of the litigants to the demands of an effective federal judicial system:

A central element in this design for the exercise of the judicial power of the Commonwealth is the power given to Parliament to make a choice between conferring federal jurisdiction on federal courts which it creates and investing federal jurisdiction in state courts. There is no indication in Ch III that the making of this choice was to be strongly weighted against the creation of federal courts in favour of investing federal jurisdiction in state courts, as it would be if the Constitution were to deny power to give authority to federal courts to decide the whole of a single justiciable controversy of which a federal issue forms an integral part. ...

It would ... restrict Parliament to the creation of federal courts lacking jurisdiction to determine such claims, thereby inhibiting their capacity as effective elements in the court system for which Ch III makes provision. The preferable approach from the viewpoint of principle is that established by authority, namely, to regard Ch III as empowering the Parliament to make sensible and practical dispositions for determination of justiciable controversies by either of the two means for which Ch III makes provision.¹⁶⁹

Thus, the recognition and expansion of the concept of accrued federal jurisdiction in this way was designed to enhance the effectiveness of the choice available to the federal Parliament under s 77(iii) of the Constitution for the exercise of Commonwealth judicial power.¹⁷⁰ While favouring the interests of the litigants, this explanation is grounded firmly in the federal (national) architecture of Ch III.

Indeed, many of the centralising Ch III developments can be plotted along this plane. For example, uniformity of outcome (common law principles and choice of law rules) in federal and state courts might be supported on the basis that disparate outcomes might affect Parliament’s choice between federal courts and state courts for the exercise of federal jurisdiction. Parliament can control the legal rules to be applied in state courts when they exercise federal jurisdiction, but it cannot control those rules when state courts exercise state judicial power. The possibility that the imposition of federal jurisdiction on state courts might lead to disparate outcomes depending on

¹⁶⁸ *Fencott v Muller* (1983) 152 CLR 570, 629 (Dawson J).

¹⁶⁹ *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, 293–4.

¹⁷⁰ See, eg, *Fencott v Muller* (1983) 152 CLR 570, 609; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, 293.

whether state or federal jurisdiction is being exercised might affect that choice in favour of federal courts. So too would the *Kable* principles. If Ch III did not impose the *Kable* requirements of institutional integrity, impartiality, independence and fairness on state courts, Parliament's choice might be significantly affected.¹⁷¹ As Gummow, Hayne, Heydon, Crennan and Kiefel JJ said in *K-Generation Pty Ltd v Liquor Licensing Court*, failure to adhere to these essential features would 'weaken the effectiveness of the distinctive feature of Australian federalism represented by the general words of s 77(iii) of the Constitution'.¹⁷²

And, finally, the harmonisation of the rules about the exercise of federal jurisdiction by non-judicial officers of federal and state courts in *Harris v Caladine* and *Hospital Contribution Fund* can be explained on the same basis. Indeed, when concluding that non-judicial officers of a state court can exercise federal jurisdiction, Mason J in *Hospital Contribution Fund* emphasised that the effective exercise of federal jurisdiction, which 'may intrude into the exercise of non-federal jurisdiction without the court or the parties perceiving that a federal element has arisen', would be undermined. His Honour concluded that '[t]here is no reflection in the provisions of Ch III of an intention to submerge the exercise of federal jurisdiction in problems of this kind ...'.¹⁷³

In short, the centralising principles outlined in Part IV might be seen as an exercise in keeping the scales evenly balanced to allow Parliament a real and effective choice between its own courts and using state courts for the exercise of federal jurisdiction.

VI CONCLUSION

In his article entitled 'The Nationalisation of the State Court System', Stephen McLeish SC sparked interest in the converging features of Australian courts. In this article I have sought to show that this undoubted convergence is part of a bigger picture: what I have loosely described as the centralisation of judicial power in Australia. Not only has there been a convergence of institutional design across federal and state courts and increased federal power over court procedures and processes, High Court jurisprudence has expanded the jurisdictional opportunities for the exercise of Commonwealth judicial power and substantially achieved uniformity of outcome across Australian courts. Although Ch III was designed to include both *national* and *confederal* features, the integrating features have been relied upon and enhanced while the distinctive features of state judicial systems have diminished. The reasons apparent from the cases for such centralising trends include the nation-building efforts to break free from colonial shackles, the rule of law advantages of a unitary legal system and the facilitation of a real and effective choice for the federal Parliament when choosing between state and federal courts for the exercise of federal judicial power.

Whether the pull of these centralising features warrants the erosion of distinctiveness in state judicial systems is a question for another day. I will, however,

¹⁷¹ Indeed, Brendan Lim has argued that the Commonwealth has largely taken the position in *Kable* cases supportive of the maintenance of these minimum requirements: above n 20, 59–67.

¹⁷² (2009) 237 CLR 501, 544.

¹⁷³ (1982) 150 CLR 49, 62. His Honour also expressed concern that a strict requirement that federal jurisdiction be exercised by state court judges would 'constrain the States' freedom of action in the organization of their courts' (at 62).

conclude by offering four brief comments on the implications arising from these centralising trends. First, High Court judges have been critical of the lack of understanding of federal jurisdiction amongst law graduates, practitioners and lower state courts.¹⁷⁴ The provision of enhanced educational opportunities in relation to Ch III of the Constitution is an important step 'to alleviate that ignorance'.¹⁷⁵ Secondly, important policy questions are presented for the Commonwealth government as to how it uses its power to vest federal jurisdiction and to control processes, practices, procedures and choice of law rules in federal jurisdiction. For example, in *Blunden v Commonwealth*, the High Court was critical of the Commonwealth's failure to enact limitation rules for civil claims pursued in federal jurisdiction.¹⁷⁶ The Commonwealth Parliament certainly has more power than it currently uses.

Thirdly, there are very large implications for state governments, particularly in the design of their dispute resolution processes and institutions, whether courts or tribunals, and the use of courts and judges in non-traditional ways. The growing trend at the state and territory levels of transferring judicial jurisdiction to tribunals will, sooner rather than later, bring these implications into sharper contrast. Finally, if there is to be a federalism constitutional amendment agenda, judicial federalism needs to take its place alongside legislative and fiscal federalism. In its 2011 report, the Senate Select Committee on the Reform of the Australian Federation devoted very little space to the federal judicial system.¹⁷⁷ If the federal judicial system is to be reformed, important questions to be considered might include whether, on the one hand, state judicial systems should be capable of variation and experimentation in institutional design, or, on the other hand, whether we instead conceive of the judiciary in Australia, as Sir Owen Dixon once suggested, as an institution that should not have a federal character or be burdened by the American conception of federal jurisdiction.

¹⁷⁴ See, eg, *Gordon v Tolcher* [2005] HCATrans 843; The Hon Justice WMC Gummow, 'Cowen and Zines's Federal Jurisdiction in Australia Third Edition, The Federation Press (2002)' (2004) 32 *Federal Law Review* 163 (Book Review).

¹⁷⁵ To adopt the comments from Gummow, above n 174, 168.

¹⁷⁶ *Blunden v Commonwealth* (2003) 218 CLR 330, 346.

¹⁷⁷ See Senate Select Committee on the Reform of the Australian Federation, above n 3.